IN THE

Supreme Court of the United States

October Term, ~~1966~~ 7

No. ~~1134~~ 61

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

v.

SUNRAY DX OIL COMPANY, SOHIO PETROLEUM COMPANY, TEXACO INC., GULF OIL CORPORATION, SUN OIL COMPANY, EDWIN L. COX, LAMAR HUNT, HUMBLE OIL & REFINING COMPANY, and UNION PRODUCING COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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Petitioner, The United Gas Improvement Company, prays that a Writ of Certiorari issue to review the judgment entered by the United States Court of Appeals for the Tenth Circuit on December 9, 1966, which reversed certain orders of the Federal Power Commission.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Tenth Circuit is not yet reported. It is reprinted as Appendix B hereto, *infra*, pages 1a-30a. The opinions and orders of the Federal Power Commission which were reviewed by the Court of Appeals are reported at 31 FPC 623 and 31 FPC 1315 (1964) and are reprinted in the Joint Appendix filed in the Court of Appeals, copies of which have been deposited with this Court by the Solicitor General of the United States (R. 354-96, 409-18).

JURISDICTION.

The judgments of the Court of Appeals for the Tenth Circuit were entered on December 9, 1966, *infra*, page 31a. Jursidiction of this Court is invoked under 28 U. S. C. § 1254(1) and § 19(b) of the Natural Gas Act, 15 U. S. C. § 717r(b).

QUESTIONS PRESENTED.

This case involves certificate applications by independent producers under §7(c) of the Natural Gas Act. The issues now before this Court arise because the Commission, prior to hearing on these applications, issued *ex parte* temporary certificates to producers in Texas Railroad District No. 4, the area involved in this case, at the very high prices contained in the producer-pipeline contracts. After the statutory hearing the Commission erroneously relied on these unregulated price levels in *ex parte* temporary certificates and other *ex parte* action to escalate the price level for the area required by the public convenience and necessity under this Court's decision in *Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 378 (*Catco*), from the 15¢ per Mcf it had established in an earlier proceeding to 16¢ per Mcf. However, it did undertake pursuant to the direction of the Court of Appeals for the District of Columbia Circuit and rulings of this Court to determine whether refund of excesses above the lawful price, collected pursuant to *ex parte* temporary certificates, was required in order to afford the consumer a complete bond of protection. On appeal by consumer representatives the Court of Appeals below affirmed the escalation of the "in-line" level. On cross appeal by producers the Court held that the Commission lacked all power to order refund of unlawful excesses. Therefore the questions presented are:

1. Does § 7 permit the Commission to issue a permanent certificate upon the condition that an applicant refund amounts collected pursuant to *ex parte* temporary certificates above the lawful public convenience and necessity price during the pendency of the determination of such price?

2. Did the Commission err in relying on temporarily certificated prices and other *ex parte* action to permit an escalation in the price level for District 4 above the level earlier found to be in-line with other properly certificated sales in the area?

STATUTE INVOLVED.

The statutory provisions involved are § 7(c) & (e) of the Natural Gas Act, 52 Stat. 821 (1938), *as amended,* 15 U. S. C. § 717f. The relevant language of these subsections is as follows:

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE.

Sec. 7(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations:

* * *

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements

of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

STATEMENT OF THE CASE.

This case presents important questions of the proper exercise of the Federal Power Commission's authority to issue certificates of public convenience and necessity under § 7 of the Natural Gas Act. The particular issue raised by this Petition is the Commission's power to condition the issuance of permanent certificates under § 7 upon the refund by producers of excess amounts collected pursuant to *ex parte* temporary certificates during the period while producer and consumer interests were litigating the question of the appropriate initial price level before the Commission. Two courts of appeals have reached directly opposite conclusions as to the power of the Commission under § 7 to order such refunds, thereby making the issue one of particular importance and urgency.

Sunray DX Oil Company and the eight other producer-respondents here entered into contracts with various interstate pipelines during a period between October, 1960, and July, 1962, to sell gas from wells located in Texas Railroad District No. 4. The gas involved was resold by the pipelines in interstate commerce. The initial prices proposed for these sales ranged from 15.9¢ per Mcf to 18¢ per Mcf. Instead of waiting for the issuance of permanent certificates, the producer-respondents applied for temporary certificates. These applications were made pursuant to that part of § 7(c) of the Natural Gas Act which confers on the Commission the power to "issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate . . . ." Universally, as in the present case, the allegations supporting the request for this authority do not cite examples of emergency conditions injuring consumers. Rather, such applications allege the possibility of economic problems for the individual producer itself,

such as drainage by adjoining owners, necessity to flare gas or even simply loss of profits.[1]

While not using the word "refund," all the temporary certificates issued to the producers here involved contained the following or a similar provision:

> "This acceptance for filing shall not be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any finding or orders which may be made in the final disposition of this proceeding or any other findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company." (R. 190, 192, 194, 196).

These temporary certificates were, during the period involved in the present case, issued by a letter mailed by the Secretary of the Commission to the producer applicant (R. 189-90). No public notice was given in the Federal Register or by other means which would enable a consumer representative as a practical matter to learn of the issuance of any such certificates. Moreover, these letter certificates were (and still are) issued in very large numbers. Consumer representatives including The United Gas Improvement Company[2] and the Public Service Commission of the State

1. The implication of all such allegations is that if the producer did not receive the privilege of the *ex parte* temporary certification he would suffer considerable economic loss. Therefore, far from conferring any "right" on the producer, the certificate constitutes a privilege and *any* benefit over total loss which the producer enjoys under the temporary certificate must be measured against such total loss, not against benefits some other producers may enjoy.

2. Under an agreement with the City of Philadelphia, The United Gas Improvement Company operates the municipally-owned Philadelphia Gas Works and related facilities. The Gas Works distributed 1035 Btu natural gas to some 600,000 customers in the City of Philadelphia.

of New York, who during this period were contesting the issuance of permanent certificates at out-of-line rate levels, likewise opposed the issuance of *temporary* certificates at equivalent out-of-line levels. These parties urged that whenever, pursuant to this Court's decision in *Atlantic Ref. Co. v. Public Service Comm'n,* 360 U. S. 378 (*Catco*) and other related decisions, the Commission conditioned a permanent certificate to a rate lower than that being collected under *ex parte* authority, it was necessary, in order to protect the consumer, also to condition the certificate upon refund of amounts already collected in excess of the legal conditioned rate level.

The first Commission decision to pass upon this issue was one involving new sales in Texas Railroad District No. 4. *Skelly Oil Company,* 28 FPC 401, 1065 (1962). In *Skelly* the Commission held that although it might have power to order refunds in some cases, it was inequitable to do so in the case before it because the temporary certificates issued to the producers there involved did not contain the express term "refund" and therefore gave the producer no warning of potential liability.[3]

This aspect of the decision was appealed to the Court of Appeals for the District of Columbia Circuit by the New York Public Service Commission, The United Gas Improvement Company and Long Island Lighting Company.[4] The Court of Appeals reversed as to this aspect, holding that the mere absence of an express refund condition in a temporary certificate was not a sufficient equitable consideration to justify the denial of consumer protective refunds. *Public Service Comm'n v. FPC,* 329 F. 2d 242 (D. C. Cir.

3. In the case of certificates which did contain the word "refund," the Commission ordered refunds without further consideration of equities.

4. Several producers also appealed the aspect of the Commission order which reduced the rates they were collecting under temporary certificates from 16¢ per Mcf to 15¢ per Mcf to be thereafter collected under permanent certification. This aspect of the Commission's decision was affirmed on appeal. *Public Service Comm'n v. FPC, supra* at 345-48.

1964), *cert. denied sub nom. Prado Oil & Gas Co. v. FPC,* 377 U. S. 963. It remanded for further proceedings, as the result of which the Commission ultimately ordered substantial refunds. *Skelly Oil Co.,* Opinion 492, issued June 1, 1966 (unreported).[5]

In the meantime there was a significant development on a related front. As a result of the pressures generated by the above litigation, the Commission took the step of making a file of *ex parte* letter certificate orders available in its public reference room (however, it still published no notice of these). By special daily investigation the New York Public Service Commission discovered certain out-of-line certificates (involving South Louisiana sales) in this file within thirty days of their issuance and appealed these *ex parte* orders also to the Court of Appeals for the District of Columbia Circuit. These letter orders were issued under the lead docket of *McDermott.* The *Skelly* appeal was pending at the same time and thus the District of Columbia Circuit was presented with all aspects of the regulatory problem of *ex parte* temporary certificates. *McDermott* and *Skelly* were heard by the same panel within a month of each other and the decisions in the two were handed down within the same month. Each must necessarily be read in the light of the other. The Court held in *McDermott* that the Commission had power to issue temporary certificates to producers, even at "out-of-line" prices, but only if such *ex parte* action was subject to complete review and adjustment at the time of permanent certification after hearing. *Public Service Comm'n v. FPC,* 327 F. 2d 893 (D. C. Cir. 1964). Then, in *Skelly,* the Court held that out-of-line temporary certificates were subject to adjustment by the ordering of refunds. *Public Service Comm'n v. FPC,* 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co. v. FPC,* 377 U. S. 963.

5. Producers have appealed this decision to the Tenth Circuit, further complicating the legal picture. *Skelly Oil Co. v. FPC,* CA 10 No. 9000 *et al.*

A final element completes the legal background of the present case. When the Commission in 1960 abandoned individual producer rate regulation and adopted an area approach, see *Wisconsin v. FPC,* 373 U. S. 294, it issued a Statement of General Policy setting forth, *inter alia,* certain so-called "guide-line" price levels for initial prices in various areas. Statement of General Policy, No. 61-1, 24 FPC 818, issued September 28, 1960. This Statement was issued without notice or hearing and was not subject to court review. *Wisconsin v. FPC,* 292 F. 2d 753 (D. C. Cir. 1961). Considerable litigation has been devoted since to the question of whether such a Statement can be given any "substantive" weight.

It did have a direct impact on the present proceeding. In the *Skelly* decision discussed above the Commission confined its 15¢ per Mcf price finding to a period prior to September 28, 1960. It severed out from *Skelly* four dockets involving contracts dated after the Statement and consolidated them with other certificate applications involving contracts also dated after that time (R. 197-202) to create the proceeding here under review. Petitioner and other consumer representatives intervened and the case was heard on the merits.

The Presiding Examiner's decision was issued on July 23, 1963 (R. 285-341). The Examiner, on the basis of the Commission's *Skelly* precedent (then not yet reversed by the Court of Appeals), refused to impose refunds of excesses collected under temporary certificates even though he found the temporary rates were unlawful. Petitioner and other intervenors excepted to this decision. On January 24, 1964, the Court of Appeals for the District of Columbia handed down the *Skelly* decision and on March 23, 1964, the Commission issued its Opinion 422 in the present proceeding (R. 354-96). The Commission reversed the Examiner's refusal to order refunds and, relying on the Court of Appeals' *Skelly* decision, severed out and

deferred decision on this refund issue pending the filing of briefs and possible evidence.[6]

Various producers appealed this refund ruling to the Court of Appeals for the Tenth Circuit which on December 8, 1966, reversed and held that:

> "[R]efunds may be ordered under § 7 only when a producer contractually undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition." (23a)

Thus the case raises a clear conflict between circuits.

6. In this opinion the Commission also found, contrary to the contention of Petitioner and other intervenors, that the "line" for initial prices had risen from the 15¢ per Mcf found in the *Skelly* proceeding for the period before 1960, to 16¢ per Mcf for the period after. The Court of Appeals below affirmed this finding of a change in the line. Petitioner believes the decision of the Commission and the Court to be erroneous as a matter of law. *Public Service Comm'n v. FPC,* CADC No. 19796 *et al.,* decided Feb. 7, 1967 (reversing an identical escalation in the in-line level in Districts 2 and 3). As to this point it relies on the Petition for a Writ of Certiorari of the New York Public Service Commission *et al.* which challenges the court below on this point.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With the Decision of the Court of Appeals for the District of Columbia Circuit Thereby Creating Serious Public and Administrative Confusion Since Subsequent Appeals Could Be Taken to Either Court.

The decision below is in direct conflict with the decision of the District of Columbia Circuit in *Public Service Comm'n. v. FPC,* 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co. v. FPC,* 377 U. S. 963 ("*Skelly*"). In the *Skelly* case the Court of Appeals for the District of Columbia Circuit held that the Commission had statutory power to order refunds of unlawful amounts collected pursuant to temporary certificates even though such temporary certificates do not specifically impose a refund obligation. The court in *Skelly* summarized the issue as follows:

> "Coming to the merits the producer intervenors say a refund condition is beyond the Commission's statutory power." 329 F. 2d at 248.

Having stated the issue thus the court ultimately concluded:

> "As we have indicated, to order refund of rates found to be excessive is not an unusual remedy; and it is not unavailable under the Natural Gas Act due to the fact that in some instances the parties are not explicitly notified early in the proceedings that such a remedy may be imposed." 329 F. 2d at 250.[7]

7. In a footnote to the conclusion just quoted the court in *Skelly* states: "To the extent that our decision may be inconsistent with . . . [Sunray Mid-Continent Oil Co. v. FPC, 270 F. 2d 404 (10th Cir. 1954)] we are constrained respectfully to disagree with the latter." It is this same *Sunray* case of which the Court below said: "Such was our holding in Sunray Mid-Continent and we adhere to it." (23a)

The Court of Appeals in the case at bar concluded by holding exactly contrary to the decision of the District of Columbia Circuit above, stating as follows:

> "In our opinion, absent the special considerations recognized in Callery, refunds may be ordered under § 7 only when a producer contractually undertakes to make such refunds by acceptance of a temporary certificate containing an express refund condition." (23a)

The *Skelly* case cannot be distinguished from the case at bar. *Skelly* involved temporary certificates issued before the Commission's Statement of General Policy, No. 61-1, 24 FPC 818 (1960), whereas here the temporary certificates had been issued after the date of the Policy Statement. However, that Policy Statement was issued without notice or hearing and has been expressly held not to create any substantive rights. *Wisconsin v. FPC,* 292 F. 2d 753 (D. C. Cir. 1961). Moreover, reading of the opinion of the court below shows clearly that its basis for finding a total lack of refund power in the Commission, as opposed to some improper exercise of such power, are all applicable alike to temporary certificates issued before or after the Policy Statement.

The very serious danger of confusion inherent in this clear conflict of holdings is graphically demonstrated by the *Skelly* case itself. There the Commission at first refused to order refunds, claiming lack of statutory power. A distributor appeal to the District of Columbia Circuit resulted in the decision quoted above and a remand to the Commission. After some delay, the Commission eventually ordered refunds. *Skelly Oil Co.,* Opinion 492, issued June 1, 1966 (unreported). Producers then appealed to the Tenth Circuit, where the case has been briefed and is presently pending. *Skelly Oil v. FPC,* CA 10, No. 9000 *et al.* If it follows its precedent under review here, the Tenth Circuit will be obliged to reverse and remand the

case once again to the Commission. If the Commission should then deny refunds, distributor interests would theoretically be entitled to appeal to the District of Columbia Circuit and obtain still another reversal under the precedent there, and so forth.[8] The same sequence could in fact occur in the present case or in any of the many cases in which this issue is presently pending.[9]

Thus the conflict present here between two circuits is much more serious than one involving a legal precedent governing the local district courts of the given circuit. The district court is obliged to follow only the law of its circuit. Here, however, an appeal under § 19 of the Natural Gas Act may find its way to any circuit, particularly the Tenth Circuit or the District of Columbia Circuit. The Commission is equally obliged by law to follow a final order of either circuit. When these are in such direct conflict as in the present case the Commission is rendered helpless to act one way or the other. Such an intolerable situation must be corrected by this Court.

8. Or, if the doctrine of law of the case came into play it could lead to an anomalous situation in which the Commission would be obliged to *reject* refunds in those cases where it found they should be ordered, so that a distributor's appeal to the D. C. Circuit would establish the proper law of the case. Such circuity and delay were clearly not the purpose of the Natural Gas Act.

9. The Commission has ordered refunds in the following cases: *Skelly Oil Co.,* Opinion 492, issued June 1, 1966, *appeal pending sub nom. Skelly Oil Co. v. FPC,* CA 10, No. 9000 *et al.,* (Texas District 4); *Hawkins & Hawkins,* Opinion 498, issued July 22, 1966, *appeal pending sub nom. Skelly Oil Co. v. FPC,* CA 10, No. 9220 (Texas District 3); *Amerada Petroleum Corp.,* Opinion 501, issued July 27, 1966, *appeal pending sub nom. Sunray DX Oil Co. v. FPC,* CA 10, No. 9227 *et al.,* (Texas District 4); *Sun Oil Co.,* Opinion 502, issued July 25, 1966, *appeal pending sub nom. Humble Oil & Refining Co. v. FPC,* CA 5, No. 24414 (Mississippi). The refund issue has also been raised, but not as yet appealed to the courts in major proceedings involving Southern Louisiana and recent sales in Texas District 4. See *Turnbull & Zoch Drilling Co.,* Opinion 499, issued July 25, 1966.

2. The Decision Below Conflicts With This Court's Decision in *United Gas Improvement Co. v. Callery Properties*, as to the Scope of the FPC's Refund Power Under § 7 of the Natural Gas Act.

United Gas Improvement Co. v. Callery Properties, 382 U. S. 223, was a recent major consideration by this Court of the Commission's powers under § 7 of the Natural Gas Act. The Court was unanimous in holding that:

> "The Commission could properly conclude that the public interest required the producers to make refunds for the period in which they sold their gas at prices exceeding those properly determined to be in the public interest." 382 U. S. at 229.

The general legal proposition underlying this conclusion was the Court's holding that:

> "An agency, like a court, can undo what is wrongfully done by virtue of its order." *Ibid.*

In the present case the "wrong" done by virtue of the Commission's "order" was the permitting of sales of gas in interstate commerce at illegally high rates which would be passed along to the consumer pending a hearing on whether the public interest in fact required such sales or such high rates.

Callery is of course technically distinguishable from the present case in that it involved permanent certificates issued after hearing from which a timely appeal was taken with an ultimate reversal. In the present case temporary certificates were issued without notice or hearing, but in every case, as soon as notice was issued, consumer representatives intervened and contested the certificates until ultimately the Commission reversed its earlier *ex parte* orders and issued permanent certificates at lower rates. In both cases the governing legal principles are the same—

the rectifying of orders issued to producers by the Commission under erroneous principles of law which never became final but were ultimately corrected by the Commission. Clearly the stringent technical narrowing of the *Callery* holding by the court below to the precise procedural posture of the *Callery* proceeding is a decision which runs against the policy of the Act. That policy has been frequently declared by this Court to be the creation of a complete, permanent and effective bond of protection for the consumer. Therefore, certiorari should be granted to eliminate an erroneous and unwarranted vitiation of this Court's holding in *Callery*.

CONCLUSION.

For the foregoing reasons it is urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: March 8, 1967

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT.

Nos. 7781, 8298, 8311, 8312, 8313, 8314, 8315, 8316, 8317, 8358, 8359, 8360 and 8362.
NOVEMBER TERM, 1966.

SUNRAY DX OIL COMPANY; SOHIO PETROLEUM COMPANY; THE UNITED GAS IMPROVEMENT COMPANY AND PHILADELPHIA ELECTRIC COMPANY; THE BROOKLYN UNION GAS COMPANY; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; LONG ISLAND LIGHTING COMPANY; TEXACO INC.; GULF OIL CORPORATION; SUN OIL COMPANY; EDWIN L. COX; LAMAR HUNT; HUMBLE OIL & REFINING COMPANY; AND UNION PRODUCING COMPANY,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

GULF OIL CORPORATION; HUMBLE OIL & REFINING COMPANY; TEXACO INC.; AND SUN OIL COMPANY,
Intervenors in Nos. 8311, 8312, 8313, and 8314.

OPINION

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION.

because of the complex and time-consuming processes incidental to the establishment of a just and reasonable rate.[18] The apparently inevitable time lag between certification and establishment of a just and reasonable rate affects the mutability of an established in-line price.

The Commission has recognized that the in-line price must reflect current conditions.[19] The Courts of Appeals have agreed.[20] Further support is found in the Callery decision where the Supreme Court referred to "other contemporaneous certificates" and "prices higher than existing levels."[21] We concur with the Commission that once the in-line price is established it is presumed to continue not until the just and reasonable rate is determined but until "substantial evidence is presented that it has changed."[22]

Thus we reach the heart of the Commission's decision. The question is whether substantial evidence sustains the 16-cent price. All the petitioners say that it does not.

The basis for the Commission's action is Staff Exhibit No. 16 which lists the provisions of gas sales in District No. 4 "dated 1955 and later with total rate of 14.0¢ Mcf and higher as accepted for filing by the Federal Power Commission as of 8-31-62." The Commission analyzed the figures presented and compared the initial contract

18. The Permian Basin Area Rate case was before the Commission for nearly five years. See supra note 6.

19. See Opinion No. 362, Skelly Oil Company, 28 FPC 401, 408; Opinion No. 412, Hassie Hunt Trust, 30 FPC 1438, 1442; Opinion No. 436, Union Texas Petroleum, 32 FPC 254, 260.

20. In United Gas Improvement Co. v. Federal Power Commission, 9 Cir., 283 F. 2d 817, 824, certiorari denied sub nom. Superior Oil Co. v. United Gas Improvement Co., 365 U. S. 879, the Court said: "As previously indicated the price line is intended to reflect current conditions in the industry." See also Sohio Petroleum Company v. Federal Power Commission, 10 Cir., 298 F. 2d 465, 467; and Atlantic Refining Company v. Federal Power Commission, D. C. Cir., 316 F. 2d 677, 680.

21. 382 U. S. 223, 227.

22. Superior Oil Co., Opinion No. 437, 32 FPC 241, 243.

prices for the two years here under consideration with those pertinent to the Skelly proceeding where the 15-cent price was fixed for sales contracted before the date of the Policy Statement. It found that in the later period 82% of the gas moving in interstate commerce was at initial contract prices of 16 cents per Mcf and higher, and that the weighted average price for the period was 17.176 cents per Mcf. For the earlier period the weighted average was 16.5 cents. This shows an increase of more than six-tenths of a cent for the later period. The Commission pointed out that the lowest selling price for substantial quantities of gas during the period in question was 16 cents and concluded that the public convenience and necessity required the issuance of the certificates at that price.

The distributors argue that the Commission considered and acted on suspect prices. United Gas Improvement Co. v. Federal Power Commission, 9 Cir., 283 F. 2d 817, 824, holds that it is an abuse of discretion for the Commission, in establishing a price line, to rely upon producer prices which are under review in pending court and Commission proceedings. In that case and the decisions of the Courts of Appeals which followed it[23] there were both numerous uncontested contracts available for consideration and certificates which the courts had rejected because of their issuance at excessive price levels.

The Examiner limited his consideration to sales under contracts which were made during the pertinent period and for which permanent certificates had been issued. The Commission found that the effect of this limitation was

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23. See United Gas Improvement Co. v. Federal Power Commission, 5 Cir., 290 F. 2d 147, certiorari denied sub nom. Superior Oil Co. v. United Gas Improvement Co., 366 U. S. 965; Public Service Commission of New York v. Federal Power Commission, D. C. Cir., 287 F. 2d 146, certiorari denied sub nom. Hope Natural Gas Co. v. Public Service Commission of New York, 365 U. S. 880; United Gas Improvement Company v. Federal Power Commission, 10 Cir., 287 F. 2d 159; and California Oil Co., Western Div. v. Federal Power Commission, 10 Cir., 315 F. 2d 652.

Before BREITENSTEIN, HILL and SETH, Circuit Judges.

BREITENSTEIN, Circuit Judge.

These petitions seek review of Opinion No. 422 [1] of the Federal Power Commission granting permanent certificates of public convenience and necessity under § 7 of the Natural Gas Act [2] for sales of natural gas produced in Texas Railroad District No. 4 to various interstate pipeline companies. Nine of the petitions are by independent natural gas producers, three are by distributing companies selling gas in the Atlantic Seaboard area, and one is by the Public Service Commission of the State of New York. All of the petitions are brought under § 19(b) of the Act.

The Commission fixed the rate at 16 cents per Mcf. The producers say that the rate is too low and the distributors say that it is too high. The parties are also at odds on the Commission treatment of the refund question. We affirm the 16-cent rate and hold that refunds of collections made in excess of that rate under temporary certificates containing no express refund condition may not be ordered.

The first petition for review was filed in the Tenth Circuit by Sunray DX Oil Company and other producers. After procedural skirmishes,[3] petitions for review of Opinion No. 422 pending in other circuits were transferred to the Tenth Circuit pursuant to 28 U. S. C. § 2112(a). The producers filed motions for leave to adduce additional evidence. These motions were deferred to the hearing of the petitions on the merits. The proceedings were held in abeyance for a time in anticipation of the decision in United Gas Improvement Co. v. Callery Properties, Inc., 382 U. S. 223.

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1. 31 FPC 623.

2. 15 U. S. C. §§ 717-717w.

3. See Amerada Petroleum Corporation v. Federal Power Commission, 10 Cir., 338 F.2d 808, and Sunray DX Oil Company v. Federal Power Commission, 10 Cir., 351 F. 2d 395.

An understanding of the issues will be helped by a brief recitation of the Commission actions and the court decisions which make up the background. The decision in Atlantic Refining Co. v. Public Service Commission of New York, 360 U. S. 378, (CATCO) directed the Commission in certificate cases to keep initial prices in line. Thereafter, on September 28, 1960, the Commission promulgated its Statement of General Policy No. 61-1.[4] This was issued concurrently with Opinion No. 338 in Phillips Petroleum Company.[5] The Policy Statement established 23 rate areas, including District No. 4 involved herein, and with unimportant exceptions announced maximum rates for each area. In Phillips, the Commission held that the regulation of independent producers under the Act could be accomplished more appropriately by the establishment of area rates than by the establishment of producer rates on individual cost-of-service findings.[6] The Policy Statement established a guideline initial rate for District No. 4 of 18 cents per Mcf.

On August 30, 1962, the Commission issued Opinion No. 362 in Skelly Oil Co., 28 FPC 401. That proceeding involved applications under § 7 for permanent certificates covering sales of gas produced in District No. 4. Therein the Commission disposed of all applications under contracts executed prior to September 28, 1960, the date of the Policy Statement, by the imposition of a 15-cent initial price condition and deferred decision on sales under four contracts bearing a later date. On the same day as the Skelly decision, the Commission promulgated its Fifth Amendment to the Statement of General Policy No. 61-1, 28 FPC 441, reducing the guideline initial rate in District

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4. 24 FPC 818

5. 24 FPC 537, affirmed D. C. Cir., 303 F. 2d 380, 373 U. S. 294.

6. The first area rate proceeding was initiated by Commission order dated December 23, 1960, 24 FPC 1121, and culminated in Opinions Nos. 468 and 468-A filed in August and October, 1965, and now under review in this court. See Skelly Oil Company v. Federal Power Commission, No. 8385, and companion cases.

No. 4 from 18 cents to 16 cents effective the same date. The four applications which had been severed from Skelly were then consolidated with a number of applications covering District No. 4 sales under contracts made between September 30, 1960, the date of the Policy Statement, and August 30, 1962, the date of the Skelly decision and the Fifth Amendment. The consolidated proceedings went forward under the style Amerada Petroleum Corporation, et al., Docket Nos. C162 etc.

In its order for the consolidated hearing the Commission stated:

> "In such a hearing all of the applicants will have an opportunity to show whether the appropriate price at which they should be permanently certificated should be limited to the 15-cent per Mcf price which we found to be the in-line price as of September 28, 1960, the 16-cent price which is being adopted as the future area ceiling price for this area, or the 18-cent per Mcf price established on September 28, 1960."

The application covered initial contract-based rates ranging from 15.9 cents to 19.8 cents.[7] During the pendency of their applications for permanent certificates, numerous producers requested and received temporary authorizations under § 7(c) of the Act and § 157.28 of the Commission regulations thereunder.[8] These were issued ex parte and without notice or hearing. Many of the temporary certificates did not contain an express refund condition.

The Amerada proceedings before the Examiner went forward contemporaneously with the judicial review of the Skelly decision, Opinion No. 362. In Amerada the producers offered, and the Examiner declined to receive, testimony and exhibits covering economic and financial requirements. Texaco Inc. sought to obtain the disclosure

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7. There was only one proposed price at 19.8 cents. The next highest was 18 cents. The proponent of the 19.8-cent price is not seeking review of the Commission action.

8. 18 C. F. R. 157.28.

and production of Commission records pertaining to the establishment of the guideline initial prices in the Policy Statement and the Fifth Amendment. This was denied. Review of the Commission actions upholding the Examiner on these two evidentiary issues was sought and denied in Texaco Inc. v. Federal Power Commission, D. C. Cir., 329 F. 2d 223, certiorari denied 375 U. S. 941, on the ground that under § 19 the petitions for review were premature.

A Commission staff economist presented, and the Examiner received in evidence, Exhibit 16. This exhibit is a summary of price and other information for all District No. 4 contracts dated 1955 or later, filed as rate schedules with the Commission, and calling for a price of at least 14 cents.[9]

The Examiner's decision issued July 23, 1963, recommended the grant of permanent certificates of public convenience and necessity to all producer applicants on specified conditions, two of which are pertinent here. The initial price was to be no greater than 15 cents per Mcf and no refunds were required of producers selling gas under temporary authorizations which did not contain any specific refund condition. Both the producers and the distributors filed exceptions to the Examiner's decision.

While the matter was pending before the Commission, the District of Columbia Circuit decided the Skelly case.[10] That decision affirmed the 15-cent in-line price established by Opinion No. 362 for District No. 4 sales under contracts made before September 28, 1960, and reversed the Commission holding that refunds could not be required when the temporary authorization contained no express refund condition.

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9. The witness said that he excluded sales below 14 cents because "the 14 cent level is the lower suspension level of Commission Policy Statement 61-1."

10. Public Service Commission of the State of New York v. Federal Power Commission, D. C. Cir., 329 F. 2d 242, certiorari denied sub nom. Prado Oil & Gas Co. v. Federal Power Commission, 377 U. S. 963.

By its Opinion No. 422, here under review, the Commission upset the Examiner on both the price and refund issues. It fixed the in-line price at 16 cents per Mcf and deferred the question of refunds under contracts having no express refund conditions.

With this background we first consider the rejection of the proffered evidence. Several producers jointly tendered testimony and exhibits covering economic and geologic factors pertinent to the area. The showing was that exploratory and drilling costs have substantially increased between the time when the majority of contracts in Skelly had been executed and the execution of the contracts with the prices here in dispute; that the public interest required further exploratory and drilling efforts in the area because of increasing demand and lessening supply; and that the public convenience and necessity required initial contract prices up to and including 18 cents per Mcf. The Commission upheld the Examiner's decision to exclude the evidence because it was not relevant to a § 7 proceeding where the test is public convenience and necessity rather than the determination of a just and reasonable rate.

CATCO [11] holds that the Act does not require a determination of just and reasonable rates in a § 7 proceeding; that if a proposed price is "out of line" the Commission may impose conditions; and that to protect the public interest the Commission acts in a § 7 proceeding "to hold the line awaiting adjudication of a just and reasonable rate." CATCO does not define the "line" and does not fix standards by which a determination may be made of whether a price is "in line" or "out of line."

In Callery the Supreme Court said that under § 7 "adequate protection to the public interest requires as an interim measure that gas not enter the interstate market at prices higher than existing levels." [12] With reference to cost and economic trend evidence, the Court mentioned

11. 360 U. S. 378, 390-392.
12. 382 U. S. 223, 227.

the experience of the Commission, said that the Commission "properly and constructively exercised its discretion in declining to consider this large quantity of evidence," and concluded that the rejection of such evidence is "an appropriate step" in the streamlining of Commission procedures.[13]

The producers seek to avoid the impact of Callery by the assertion that the proffered evidence was a streamlined presentation which could not cause any crippling delay. In our opinion, the admissibility of such evidence does not depend on any quantitative test. Relevance is determined by the substance of the offer. Although we agree with the producers that neither CATCO nor Callery establishes any specific evidentiary standards, the point is that the just and reasonable rate standards of §§ 4 and 5 do not apply to § 7 where the test is public convenience and necessity. We do not say that economic and geologic evidence is never admissible in a § 7 proceeding. This may depend on varying circumstances. All we say is that in the posture of this case the Commission did not abuse its discretion by rejecting the evidence.[14]

By request to the Examiner and by application for a subpoena duces tecum and ad testificandum, Texaco Inc. sought to obtain the disclosure of the data and materials underlying and supporting the price levels for initial sales in District No. 4 as announced by the Commission in its Policy Statement and in the Fifth Amendment thereto. In sustaining the Examiner's denial, the Commission pointed out that the burden is on a producer-applicant to prove that a certificate is required by the public convenience and necessity; that the effect of the Texaco motion is to place on the Commission the burden of justifying the price expressed in the Policy Statement; and that Texaco had demonstrated no reason for the production of the docu-

13. Id. at 228, note 3.

14. See Public Service Commission of the State of New York v. Federal Power Commission, D. C. Cir., 329 F. 2d 242, 246-247.

ments and issuance of a subpoena as requested. Consideration of this problem is entwined with the intent and effect of the Policy Statement.

We have noted that the Policy Statement fixed an 18-cent price, that Skelly, Opinion No. 362, fixed a 15-cent price for the period prior to the issuance of the Policy Statement, that the Fifth Amendment to the Policy Statement fixed a 16-cent price, and that we are here concerned with contracts executed between the date of the Policy Statement and the date of the Fifth Amendment. The producers argue that the Policy Statement established an 18-cent in-line rate. The distributors contend that Skelly established a 15-cent in-line rate. None of the petitioners are happy with the 16-cent rate which the Commission decreed.

The basic claim of the producers is that the Policy Statement set in-line prices on which they were entitled to rely. In our view this is a misconception of the Commission action. The Policy Statement is just what it purports to be—an ex parte statement issued without hearing by an agency to advise the public properly of the manner in which the agency proposes to exercise a discretionary power. Reference is made therein to "price standards" and "price levels." The purpose is that of "guidance and initial action by the Commission." The effect is that, "in the absence of compelling evidence calling for other action," producer applications for certificates proposing higher rates than those listed will be either denied or conditioned. The result is that the Policy Statement plays a "significant role" in arresting the upward trend of producer prices.[15]

The announcement of a guide to price levels or price standards is not the establishment of an in-line price. That is accomplished after notice and hearing in an appropriate proceeding—not in a policy declaration. No doubt de-

15. Wisconsin v. Federal Power Commission, 373 U. S. 294, 312-313.

signedly, the Commission did not specify the formula which it used in arriving at the guideline rates. Its failure to do so may put a burden on producers and distributors alike in any attempt to show that a guideline price should or should not be adopted as an in-line price. The presence of such burden neither requires nor permits a party to go back of the Policy Statement in search of its justification. That is the administrative concern of the Commission. It follows that the request and application of Texaco for the underlying data and materials were properly denied.

The Commission may not rigidly and arbitrarily impose a guideline price as an in-line price. The Policy Statement recognizes that compelling evidence may call for action other than granting a certificate at the guideline price. The point is that, in the context of the proceedings before us, the establishment in 1960 of the 18-cent guideline cannot be ignored by the Commission in arriving at the in-line price.[16] Its effect had to be, and was, evaluated by the Commission.

The other extreme of the dispute is the position of the distributors who say that the 15-cent price established in Skelly, Opinion No. 362, for contracts executed prior to the date of the Policy Statement is the in-line rate which is presumed to continue until a just and reasonable rate has been determined in an area rate proceeding.[17] We agree with the distributors that the in-line procedure is an interim device and is not intended to be a permanent method of producer regulation. It is a necessary device

16. In Public Service Commission of the State of New York v. Federal Power Commission, D. C. Cir., 329 F. 2d 242, 247, the court said: "The Commission could not have ignored altogether its own Policy Statement, but it was not required to be controlled thereby in deciding, in the Section 7 proceedings, that the in-line price should be fixed at a less amount on the basis of the evidence analyzed in its opinion."

17. The just and reasonable rate for the sales certificated by the Commission in the order under review will be fixed in the Texas Gulf Coast Area Rate Proceeding, AR64-2, now in hearing before a Commission Examiner.

to arrive at an in-line price on the basis of only 1.39% of the volumes for all sales shown. In the UGI decision of the Ninth Circuit, mentioned above, the court said that the line "may properly be referenced to relevant existing producer prices under which substantial amounts of natural gas move in interstate commerce." [24]

Thus we have here a situation vastly different from that presented in the cases which have dealt with the suspect price doctrine. Exhibit 16 included the sales under consideration in the very proceedings in which the exhibit was presented. The distributors say that this is an impermissible bootstrap procedure. The producers in turn say that the reason for the small percentage of sales free from attack is the action of the distributors in contesting all sales above the price which is acceptable to the distributors.

In the determination of an in-line price, permanent certificates have a greater weight than do either temporary certificates or contract rates under attack. At the same time, when no appreciable volume of gas is moving under permanent certificates, the Commission has nothing upon which to base a decision as to in-lineness unless it turns to the temporaries. In fixing the 15-cent price for District No. 4 sales which preceded the Policy Statement, the Commission in Skelly gave a "limited degree of consideration" [25] to the price range of contracts resulting in temporary certificates although it recognized that they were not "as persuasive" [26] as permanent certificates. The price fixed in Skelly was upheld by the District of Columbia Court of Appeals which commented that the Commission gave "less consideration" to the temporary certificates than it did to the permanents.[27]

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24. 283 F. 2d 817, 823.

25. 28 FPC 1065, 1068.

26. 28 FPC 401, 409.

27. Public Service Commission of the State of New York v. Federal Power Commission, D. C. Cir., 329 F. 2d 242, 245-246.

An in-line price is intended to reflect the price at which substantial volumes of gas are currently contracted for sale in interstate commerce. This determination cannot be made if all current sales are within the "suspect price" doctrine because of objections made to them. Such an application of the doctrine would, as said by the Commission, make the price determination dependent on the "unreviewable fiat" of the objectors. Our conclusion is that in the circumstances of this case the Commission did not abuse its discretion by the consideration given to prices not covered by permanent certificates.

The producers say that the in-line price for permanent certificates should be the highest price at which substantial quantities of gas move in interstate commerce and that here the Commission has fixed the lowest rather than the highest price.[28] The producers rely on the statement in Callery that:[29] "We believe the Commission can properly conclude under § 7 that adequate protection to the public interest requires as an interim measure that gas not enter the interstate market at prices higher than existing levels." This language does not mean that the public interest is not protected if the sales are approved at less than existing levels.

The distributors point to the decision in Atlantic Refining Co. v. Federal Power Commission, D. C. Cir., 316 F. 2d 677, 679, which says that "if the Commission is to err in setting an initial rate, it should err on the low side" because of the right of a producer to file immediately for a rate increase under § 4. From this premise they argue that the 15-cent price of Skelly should have been adopted. The provisions of § 4, although they may not be disregarded, are not a complete answer. Rate increases filed thereunder are sub-

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28. The opinion of the Commission says: "The record makes it clear that the lowest price at which substantial volumes of new gas were sold in interstate commerce in the area during the period in question was 16 cents per Mcf." 31 FPC 623, 637.

29. 382 U. S. 223, 227.

ject to suspension. The producers may have the use of the money collected but it is at interest if refunds are ordered and royalty and tax payments have to be made on the total amount collected. If the just and reasonable rate as finally determined is greater than the in-line rate adopted, the producers have no way of recouping their losses.[30] Our view is that the possibility of filing for increased rates under § 4 does not require that the Commission fix the price in a § 7 proceeding at a figure lower than that at which substantial volumes of gas are currently contracted for sale in interstate commerce.

Both producers and distributors attack the 16-cent price on the ground that it results from an improper use of, and reliance on, agency expertise. For over 12 years since the decision in Phillips Petroleum Company v. Wisconsin, 347 U. S. 672, the Commission has been struggling to regulate the independent natural gas producers under an act which is not well designed for the attainment of that objective. Serious administrative problems have developed. Procedures and methods have changed from time to time. Whether those now in use will receive full judicial approval remains to be seen. In the economic regulation with which the Commission is concerned the experience of the past must be projected into the future. The importance of expertise may not be downgraded. A delicate balance must be maintained between producer and consumer interests if the continued life of the industry is to be assured.

We have noted that an in-line price continues until substantial evidence shows a change. The producers point out that the Commission controls the variables which would result in a change by rejecting evidence both of producers' costs and of initial prices which it considers suspect. The potential for circuity of action does not impress us too

30. An example is found in the pending Permian Basin Area Rate proceedings. The Policy Statement fixed the guideline price at 16 cents but the just and reasonable rate for new gas sold under contracts dated after January 1, 1961, was fixed at 16.5 cents.

much. The cost evidence has been refused because it goes to the just and reasonable rate issue. In a § 7 proceeding the test is public convenience and necessity and evidence relevant thereto should be received. In the applications before us this evidence, in large measure, has taken the form of a showing of contract-determined initial prices. The Commission has given consideration to prices under temporary authorizations and under permanent certificates. Greater weight has been given to the permanent than to the temporary certificates. Some prices have been discounted as too high and some as too low. We believe this is proper. Here, at least, the result reached has not come from the use of a crooked yardstick.

The analysis and use of field prices established by producer-pipeline contracts require expertise. Objections to the use of weighted averages are not well taken. Such averages are necessarily lower than the highest prices paid. At the same time nothing is wrong with the use of weighted averages to compare price levels. Here the Commission has made such comparisons. These are proper as long as the action is not capricious or arbitrary.

It is apparent that in the case at bar the Commission was confronted with a difficult situation. CATCO tells it to hold the line. The Ninth Circuit UGI decision[31] says that the price line is intended to reflect current conditions and that the prices on which it is based must be those under which substantial quantities of gas move in interstate commerce. Various decisions warn against the use of suspect prices. Because of objections to most pertinent certificate applications, the number of permanent certificates available for comparison purposes represents only a meager amount of gas. The Commission took due note of all factors and concluded that the price required by public convenience and necessity is 16 cents. We believe that in so doing the Commission acted reasonably and that "we owe it the same

31. 283 F. 2d 817.

deference to its expertise that courts generally owe to the specialized boards and commissions created by the Congress to deal with complex and difficult problems in the field of economic regulation."[32] We find no abuse of discretion and affirm the 16-cent price.

The path from the morass of in-line prices leads directly to the thicket of refunds. Here again the traveled way is not well marked and we have a three-way disagreement among the parties over the route to be followed.

In the consolidated proceedings before the Commission, 27 of the 35 dockets related to applications in which temporary certificates had been issued without any express refund condition.[33] The Examiner held that on the authority of Opinion No. 362, Skelly, he had no power to order refunds when the temporary certificate did not contain an express refund provision. While the proceedings were pending before the Commission on exceptions, the District of Columbia Circuit reversed the pertinent holding in Opinion No. 362.[34] On the authority of that decision the Commission reversed the Examiner on the refund issue and held that "the public interest would best be served by deferring for the present the decision whether refunds should be ordered * * *, and if so, the extent of such refunds." The Commission said that the parties "will be given an opportunity to submit further briefs on the issue of refunds."

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32. People of the State of California v. Federal Power Commission, 9 Cir., 353 F. 2d 16, 23. See also Charleston & Western Carolina Railway Company v. Federal Power Commission, D. C. Cir., 234 F. 2d 62, 64.

33. In the remaining 8 applications a typical authorization is conditioned upon the refund to purchasers of "any amounts collected plus interest at 7 percent per annum in excess of 15.0 cents per Mcf which may be determined to be in excess of the price required by the public convenience and necessity."

34. Public Service Commission of the State of New York v. Federal Power Commission, D. C. Cir., 329 F. 2d 242, certiorari denied sub nom. Prado Oil & Gas Co. v. Federal Power Commission, 377 U. S. 963.

At the outset we are met by the Commission argument that the refund issue is not now reviewable because § 19(b) makes aggrievement a jurisdictional prerequisite to review of Commission orders and here aggrievement is absent because no refunds have been required. In denying the Commission motion to dismiss the Sunray petition [35] we held that Sunray was likely to suffer injury by the determination of the in-line price and that the threat of refunds made it an aggrieved party.

The threat has been followed by action. On July 27, 1966, the Commission issued Opinion No. 501 in the Amerada consolidated dockets which were considered in Opinion No. 422 here under review.[36] Opinion No. 501 says that the producers therein listed "will be ordered to make refunds of all amounts collected in excess of 16 cents per Mcf while operating under temporary certificates" with the exception of certain royalty and tax payments not pertinent here. The producers listed include Sunray and six others who are petitioners in these proceedings. They are required to report their excess collections and hold them subject to the further order of the Commission "directing the disposition of those amounts."

Opinion No. 422 as implemented by Opinion No. 501 adversely affects Sunray and the other six producers. Although payment itself is not yet required, the producers are

35. Sunray DX Oil Company v. Federal Power Commission, 10 Cir., 351 F. 2d 395, 400. The position of Sunray is important because all other petitions to review are transfers from other circuits.

36. This opinion was called to our attention during the argument of the South Louisiana cases, our Docket Nos. 7912 etc., Pan American Petroleum Corporation, et al. v. Federal Power Commission. We also have pending before us Docket No. 9000—Skelly Oil Company v. Federal Power Commission—which seeks review of Commission Opinion No. 492. A court may take judicial notice of its own records. Dial v. Johnson, D. C. Cir., 259 F. 2d 189, 190. Although Opinions Nos. 492 and 501 were issued after the case at bar had been argued orally and submitted for decision, they are not controverted and the demands of justice require that we notice them. See Ellis v. Cates, 4 Cir., 178 F. 2d 791, 793, certiorari denied 339 U. S. 964.

told that the excess collections do not belong to them. The only thing which remains to be decided is the question of who gets the money ~~and~~ under what conditions. This is not a case like either Texas Eastern Transmission Corp. v. Federal Power Commission, 5 Cir., 357 F. 2d 232, or United Fuel Gas Company v. Federal Power Commission, 4 Cir., — F. 2d —. They related to an order directing that refunds generated by a settlement agreement be retained by the producer pending Commission inquiry into whether release of the refunds to the pipelines would be proper. There the obligation to refund was fixed by the settlement. Here the obligation to refund is fixed by a Commission order. A producer has a right to a prompt determination of its liability. We believe that the question of the power of the Commission to order refunds of amounts collected under temporary certificates containing no express refund condition is ripe for determination and that proper judicial administration requires that it be deferred no longer.

Temporary certificates are issued ex parte and without hearing under § 7(c) of the Act in accordance with Commission Regulation § 157.28(c).[37] A party aggrieved by the issuance of such certificate has the right to judicial review.[38] The first attack on the absence of an express refund condition in the temporaries here under consideration came when the distributors, during the pendency of the proceedings before the Examiner, moved for the termination of the temporaries or in the alternative for a floorless refund condition. The Commission denied the motion. It declined to impose the refund condition because "we think clearly this would not be a proper action for us to take here." It further said that such action "would so denature the value of

37. 18 C. F. R. § 157.28(c). Public Service Commission of the State of New York v. Federal Power Commission, D. C. Cir., 327 F. 2d 893, 896, upholds the applicability of § 7(c) to independent producers and the validity of the regulation.

38. Id. at 895. The Court there held that the New York Public Service Commission had the right to petition for the review of an order granting a temporary certificate.

a commission authorization as to place any reliance upon our actions in this area in serious jeopardy" and that "we find it would be contrary to the public interest, as well as inequitable, to condition the temporary certificates" as requested by the distributors. The distributors did not seek review. We do not accept the producers' view that the unreviewed denial of the motion irrevocably determined the refund issue. The Commission could change its mind. At the same time the reasons given for the action are most compelling and show mature consideration of the problem.

The distributors emphasize the importance of refunds to the protection of the consumer interests. This may be conceded to the extent that refunds are passed down to the ultimate user. These benefits must be weighed against the desirability of the maintenance of an adequate supply of gas. A repricing of the gas, without warning, cannot help but have a severe impact on the operations of the producers. We will not speculate on the effect of such repricing on their exploration and development activities. The benefits derived from such costly activities may or may not be of greater value, from the public standpoint, than the few dollars recovered by the home consumer. Perhaps he would rather have an assured supply for his expensive appliances than a modest refund. In any event the record does not purport to cover such issues and we turn to the decisions which the parties say control the outcome.

In our opinion the Callery decision[39] does not dispose of the issue presented here. The Supreme Court was there concerned with South Louisiana prices which had been the subject of much litigation.[40] The Court recognized that the Commission may not make reparation orders but said that "it is not so restricted where its order, which never became

39. United Gas Improvement Co. v. Callery Properties, Inc., 382 U. S. 223.

40. See CATCO, 360 U. S. 378, and Public Service Commission of the State of New York v. Federal Power Commission, 361 U. S. 195, reversing 269 F. 2d 865. See also cases cited supra note 23.

final, has been overturned by a reviewing court'' and that ''judicial review at times results in the return of benefits received under the upset administrative order.''[41] The situation here is different. This is the first judicial review of the prices under consideration and we uphold the Commission on its in-line rate.

In Sunray Mid-Continent Oil Company v. Federal Power Commission, 10 Cir., 270 F. 2d 404,[42] Sunray applied for temporary authority which was granted on the condition that an undertaking be filed ''to assure refund of any portion of the difference, if any, between the proposed initial price of 16.4¢ per Mcf and the level of any price which the Commission may lawfully find to be required by the public convenience and necessity.'' We pointed out that Sunray was required ''to speculate'' as to what the rate might be and was denied ''its right to have the Commission act upon its application with such certainty as to allow the exercise of choice upon Sunray's part.''[43]

We have noted that Commission Opinion No. 362 pertaining to District No. 4 sales made under contracts executed prior to September 28, 1960, was set aside by the District of Columbia Circuit on the refund issue.[44] The Court there held that the ''power [to order refunds] does not depend upon an explicit refund provision in a temporary certificate.''[45] The Court went on to say that the exercise of the power was not ''mandatory'' and that the ''refund

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41. 382 U. S. 223, at 229.

42. The Sunray Mid-Continent case considered two consolidated petitions for review. We are here concerned with No. 6061.

43. 270 F. 2d 404, at 408-410.

44. The Supreme Court denied certiorari to review the District of Columbia Circuit decision. See Prado Oil & Gas Co. v. Federal Power Commission, 377 U. S. 963. Denial of certiorari "imports no expression of opinion upon the merits of the case." United States v. Carver, 260 U. S. 482, 490, and Pan American Petroleum Corp. v. Federal Power Commission, 10 Cir., 352 F. 2d 241, 243.

45. 329 F. 2d 242, at 249.

issue requires further development and fuller consideration of the equitable factors other than those thought to flow from the mere absence of an explicit refund condition in the temporary certificates."[46]

The Court quoted the general language of the temporary certificates[47] that "acceptance for filing shall not be construed as constituting approval of any rate" and that authorization and acceptance of the rate schedule "are without prejudice to such final disposition of the certificate application as the record may require." It then concluded that "all else aside" these provisions authorize the conditioning of a permanent certificate by a refund requirement.

In our opinion these provisions mean that the Commission is not binding itself, by the issuance of a temporary certificate, to issue an identical permanent certificate of prospective effect after a hearing.[48] In its denial of the distributors' motion for refund conditions the Commission gave no recognition or effect to such provisions. We believe that the Commission intended the routine, boiler-plate language to have a purpose entirely different from that of an express refund condition.

When a producer dedicates its gas to interstate commerce, "there can be no withdrawal of that supply from continued interstate movement without Commission ap-

46. Id. at 250.

47. This language is quoted in 329 F. 2d 242, at 249 and is the same as that found in the temporary certificates which are in the record before us and which do not contain express refund conditions.

48. Included in the dockets considered by the Commission in this consolidated proceeding was No. C162-276 in which a temporary certificate was issued to, but not accepted by, Sun. It contained a definite refund obligation covering collections at a rate above 15 cents per Mcf and the provision that: "This temporary certificate and the acceptance of the above rate schedule are without prejudice to such final disposition of the application for certificate as the record may require." The inclusion of this routine langauge could not mean that the explicitly floored refund obligation became floorless.

proval."[49] If the language mentioned means that a producer accepting such certificate without express refund conditions dedicates its gas without any floor on the rate, the producers have taken many uncalculated and uncalculable risks. We suggest that for the good of the public, the consumers, the distributors, the pipelines, and the producers certainty and stability are of prime importance.

The situation in the case at bar differs from that presented to the District of Columbia Circuit. The proceedings there involved § 7 applications for permanent certificates covering District No. 4 sales under contracts executed before the issuance of the Policy Statement. Here we are concerned with sales under contracts made between the date of the Policy Statement and the date of the Fifth Amendment. For that period the guideline initial rate was 18 cents. The temporary certificates with which we are concerned were issued "at prices not exceeding 18¢ per Mcf."[50] The 18-cent figure is significant and meaningful.[51] It resulted from the exercise of Commission expertise. When the producers dedicated their gas under temporary certificates permitting the collection of prices up to 18 cents without express refund obligation, they were entitled to rely on them. They were entitled to rely on the prior decisions of the Commission declining to order refunds of collections under unconditionally authorized temporary certificates.[52] For a period of several years the producers have sold their gas without warning that refunds would be required upon the grant of a permanent certificate. We believe that when a producer dedicates its gas to interstate sales it is entitled to know with some degree of certainty the conditions imposed so that it may make an intelligent decision whether

49. Sunray Mid-Continent Oil Co. v. Federal Power Commission, 364 U. S. 137, 156. See also § 7(b) of the Act.

50. See Opinion No. 501.

51. See Sohio Petroleum Company v. Federal Power Commission, 10 Cir., 298 F. 2d 465, 468.

52. See dissenting opinions of Commissioner O'Connor in Opinions Nos. 492 and 498.

to accept or reject the certificate. Such was our holding in Sunray Mid-Continent and we adhere to it. In our opinion, absent the special considerations recognized in Callery, refunds may be ordered under § 7 only when a producer contractually undertakes to make such refunds by the acceptance of a temporary certificate containing an express refund condition.

The motions to adduce additional evidence are severally denied. The cases are all remanded for further proceedings consistent with this opinion.

SETH, *Circuit Judge,* dissenting in part:

I respectfully dissent on the issue of the "in-line" price because the Commission, in its determination of this issue in the consolidated cases here on review, has adopted a new concept of "in-line" which constitutes too wide a departure from prior usage and practice and from the authorities to be approved.

The Commission has here divided the range of prices into several segments, and has announced that the price here to be certificated is the lowest segment, ". . . the lowest price at which substantial volumes of new gas were sold in interstate commerce . . . ." The Commission is very candid in its selection of this lowest price. Its findings and its comments on the evidence show that a higher price would otherwise follow. For example, the Commission stated that the evidence ". . . points in the direction of a higher price . . . ," than 16 cents which was the price here adopted. The Commission also said: "Our decision herein draws the line substantially below the average going price for gas in the area and in fact, two cents per Mcf below the Commission's guideline ceiling price prevailing at the time these contracts were executed."

The Commission also found that only a price above 18 cents ". . . would have an adverse impact on the pricing structure in the area."

The selection of the lowest segment is explained by the Commission in its opinion where it states: "In the final analysis our action in fixing the price at which these sales should be certificated requires an exercise of our informed judgment and utilization of the expertise developed in the handling of thousands of producer certificate applications."

To provide some factual material on this particular issue, reference should be made to the evidence upon which the Commission placed its principal reliance, if not its sole reliance. This consisted of the following:

1. The Commission's Statement of General Policy No. 61-1, September 28, 1960, 24 F. P. C. 818, announcing an 18 cent guideline price.

2. The Fifth Amendment to Statement of General Policy No. 61-1, August 30, 1962, 28 F. P. C. 441.

3. Staff Exhibit No. 16, admitted at the hearing, which consisted of a summary of field prices under contracts executed between January 1, 1955, and August 31, 1962, for sales in Texas Railroad Commission District No. 4 on file with the Commission and having a total initial rate of 14 cents per M.c.f. This exhibit included permanent certificates, temporary certificates, and the sales which were in issue in the consolidated proceedings.

Of the above several exhibits, the Commission considered Staff Exhibit No. 16 as the most important. The opinion of the Commission with reference to this exhibit, and to the period in issue, shows the following:

1. The weighted average price by volume was above 17.178 cents.

2. Eighty-two per cent of the gas sold was at 16.0 cents *and above.*

3. Seventy-one per cent of the gas was being sold at 17.0 cents *and higher.*

4. The table in the Commission's opinion with reference to this Exhibit also shows that twenty-seven per cent of the gas was sold at 16 cents *and below* and twenty-eight per cent at 16.5 cents *and below.*

The Commission found that 16 cents was the "in-line" price and stated, as referred to above, ". . . . the record makes it clear that the lowest price at which substantial volumes of new gas were sold in interstate commerce in the area in the period in question was 16 cents per M.c.f."

The use in the text of the opinion of the term "and above" in the finding that eighty-two per cent of the gas passed at 16 cents and above appears to be somewhat unusual in view of the Commission's selection of the lowest price. It would appear that the reference to percentages or quantities of gas would instead include the amounts which passed at a figure of 16 cents or less. The opinion itself shows that some ten per cent of the gas was sold *at 16 cents,* some eleven per cent of the gas was sold at 16 cents to 16.5 cents, inclusive, and twenty-seven per cent at 16 cents *and below.*

As stated above, it is however not necessary to demonstrate by the figures that the Commission selected the lowest segment by reason of their recitation that they were so doing. In this consideration it should also be borne in mind that the Commission also found that there would be no adverse impact on the pricing structure in the area except by a price above 18 cents.

There would seem to be no question but what an "in-line" price is to be determined on the basis of contemporaneous certificates as stated by the Supreme Court, and on contemporaneous contracts where necessary. This price must represent the prevailing current conditions as the Commission states in its opinion. United Gas Improvement Co. v. Federal Power Comm'n, 283 F. 2d 817 (9th Cir.). The Supreme Court has clearly stated that the "in-line" price is a device which will prevent gas from entering the interstate market ". . . at prices higher than the exist-

ing levels . . . . ."; and ". . . consumer protection is afforded by keeping the 'in-line' price at the level where substantial amounts of gas have been certificated to enter the market under other contemporaneous certificates, no longer subject to judicial review or in any way 'suspect.'" United Gas Improvement Co. v. Callery Properties, Inc., 382 U. S. 223. Also "where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in the triggering of general price rises . . . ." Atlantic Refining Co. v. Public Service Comm'n, 360 U. S. 378.

The Commission in its determination of the "in-line" price in this case by an adoption of the lowest price departed from the "current conditions test," and the "existing levels test," referred to by the Supreme Court. This departure represents a basic change in policy, and is not just a difference in what quantity may constitute a "substantial quantity." The Commission did not base its decision on such a distinction. It clearly and candidly selected the lowest segment of the price range. The Supreme Court in its references to current conditions can only mean the prevailing or predominant conditions existing in the area and cannot mean the lowest or the highest of the prices, for such are not typical or prevailing prices. In common usage something "in-line" is in conformance with other persons or things; it is, to borrow a phrase from the civil rights vocabulary, "in the mainstream"; it is a "prevailing price," a "going rate." It is not of the extreme in any direction, it is not the widest, the longest, the lowest, or the highest.

The Commission properly used the permanently certificated prices, and the temporary certificated prices, including the prices in issue here. I agree with the majority that these contracts or prices elsewhere referred to as "suspect" must be used in this case. They must be used for all purposes. This was the only data available for a realistic consideration of the issues, the economic data

of the petitioners having been excluded. The Commission considered all the certificates in order that it could have before it a "substantial quantity" of gas. It rejected the examiner's limited consideration with the following language:

> "Examination of the staff exhibit reveals that the permanently certificated sales considered by the examiner in fixing the 'in-line' price amount to only 1.39 per cent of the volumes for all sales shown and to no more than 2.05 per cent of the sales permanently certificated in the District contained in the exhibit."

and

> ". . . In such circumstances it can hardly be maintained that the 'in-line' test of the 'prices under which a substantial amount of natural gas presently moves in interstate commerce' has been fully met by the examiner. In our opinion it would be manifestly improper to base an 'in-line' price upon the initial prices permitted in these few isolated and inherently nonrepresentative sales whose total volume does not even begin to approach the amount of natural gas production involved in these dockets."

Thus all were considered to attain a sufficient volume, and the Commission did not and could not then disregard the temporary certificates on the price issue. Nor did the Commission state in its opinion that the temporary certificates were to be given less weight in its determination in this case. There is also no indication that they were given less weight other than the arguments in the briefs. The Opinion of the Commission in its explanation as to why the temporary certificates should be considered referred to its Texaco Seaboard case, 29 F. P. C. 593, where it said permanent certificates are decidedly more persuasive than are temporary, but continued ". . . this does not thereby render temporary authorizations *per se* inadmissible." The Commission then said:

> "The soundness of this principle is readily apparent when viewed in the light of the facts before us, where, absent the ability to consider these authorizations, we would not be basing our decision upon 'substantial volumes of gas moving in interstate commerce.'"

The Commission then refers to the examiner's consideration quoted above. These references are only to *what* should be examined.

Thus the Commission considered the very large proportion of gas passing under temporary certificates, but did not state that this should receive less consideration or be given less weight than that permanently certificated. The Commission only stated:

> "We believe that the fact that the great bulk of the gas moving in interstate commerce in the area during this period was contracted for and temporarily authorized at initial rates between 16 and 18 cents per Mcf must be considered in fixing the 'in-line' price for this period. Refusal to consider the temporarily authorized prices, in the circumstances of this proceeding, and reliance only on the few permanently certificated prices can only result in a complete stagnation of prices at the 'in-line' level initially determined for this District, a level based on prices being paid for gas under contracts drawn up long before these contracts were executed."

Thus from what is said in the Opinion, it cannot be concluded that the Commission has given less weight to the prices in the temporary certificates. With the minute percentage of the volumes considered being permanently certified, it would indeed require that the temporary certificates be virtually disregarded to explain a 16-cent price, and there is no indication that the Commission did so.

The Supreme Court has repeatedly said that the prices added as conditions to certificates under Section 7 do not

constitute initial pricing by the Commission. Federal Power Comm'n v. Hunt, 376 U. S. 515. Thus the Commission is to set a price in the public interest and in line with current conditions in the area, not what the Commission thinks is just and reasonable or to be on the "safe side," one way or the other, for that would clearly be initial pricing. The selection here by the Commission of the "lowest price" by the exercise of its expertise is initial pricing because it is not and does not purport to represent "current conditions."

This error by the Commission is one of law. It is the erroneous application of the standards set by the Supreme Court for the determination of "in-line" prices.

It would seem to be unnecessary to dwell on the importance of the Commission's determination of "in-line" prices, as the delays which are necessarily inherent in their determination and in any subsequent determination of just and reasonable rates are obvious. The period under consideration in these consolidated cases begins in 1960, and the case concerns certificates covering some 31,500,000 M.c.f. per year. It is apparent that the prices so established will remain in effect for many years, and consequently large quantities of gas will be sold under any determination of "in-line" prices by the Commission. The Supreme Court, in Atlantic Refining Co. v. Public Service Comm'n, 360 U. S. 378, referred to the "inordinate delay presently existing in the processing of § 5 proceedings, . . ." and again in the same case to ". . . the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable appears well nigh interminable." These prices have in reality become more than a mere interim device, especially when coupled with moratoriums which may be imposed by the Commission.

Thus the importance of the "in-line" determination of the price additive to public convenience and necessity becomes all the greater. The Commission's methods and the evidence used to support its findings must be more closely scrutinized.

Thus I would conclude that the Commission committed an error in law in applying the wrong standards for its determination of 16 cents as the "in-line" price in this case. This was selected, as the Commission states, as the lowest price, and I would remand the case for a determination not of the lowest price and not of the highest price, but of the "in-line" price.

On a somewhat different point I also disagree with the majority. Reference is made in the majority opinion to Superior Oil Co. Opinion No. 437, 32 F. P. C. 241, and there is adopted a rule that the "in-line" price once established is presumed to continue until "substantial evidence is presented that it has changed." If this means that some sort of a presumption attaches to prior "in-line" prices which must be overcome, I disagree.

The authorities demonstrate clearly that the "in-line" price is to be determined on the basis of contemporaneous certificates, contracts, and price data. This necessarily contemplates the possibility of change from time to time in either direction. Sohio Petroleum Co. v. Federal Power Comm'n, 298 F. 2d 465 (10th Cir.). Once an "in-line" price is established, it continues for those bound until *formally* changed but this does not necessarily mean that a presumption attaches to a previous "in-line" price which must be overcome by any greater weight of evidence than would be required had no "in-line" price been established. There is no basis in the statutes for a presumption or continuing weight to be given to a prior determination in another proceeding. By definition the "in-line" price is what then prevails and not what has prevailed in the past nor influenced by what has prevailed in the past. Whether the change is large or small should of itself make no difference in the determination; the changes from time to time should freely come about, based upon conditions as they may then exist.

APPENDIX B.

JUDGMENT.

Nineteenth Day, November Term, Friday, December 9th, 1966.

Before Honorable Jean S. Breitenstein, Honorable Delmas C. Hill and Honorable Oliver Seth, *Circuit Judges.*

These causes came on to be heard on petitions to review orders of the Federal Power Commission and motions to adduce additional evidence and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the motions to adduce additional evidence are severally denied, and the causes remanded for further proceedings consistent with the opinion of the court.

By order of January 7, 1967, the mandate of the United States Court of Appeals was stayed to February 13, 1967.

By order of February 10, 1967, the mandate of the United States Court of Appeals was stayed to March 6, 1967.